December 2, 2015

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security and Governmental Affairs  
328 Hart Senate Office Building  
Washington, D.C.  20210

Dear Chairman Johnson:

Several weeks ago, the Committee on Homeland Security and Governmental Affairs held a hearing to examine the use of sub-regulatory guidance. The hearing examined guidance issued by the Departments of Labor and Education, its effects on regulated parties and the public at large, and ways to ensure guidance is utilized appropriately going forward. Thank you for your leadership and interest in this important matter.

As you know, there has been a great deal of attention around Title IX and how institutions of higher education prevent and respond to allegations of sexual misconduct on their campuses. The UW System and its institutions have had in place for many years robust and well-publicized policies for the effective prevention of and response to sexual misconduct. We take our obligations in this area seriously and are committed to providing safe learning environments for our students. We are continually evaluating our policies, which we are doing currently through the leadership of a system-wide task force, to ensure they continue to be effective, fair and compassionate.

As many institutions of higher education have noted, the U.S. Department of Education, and in particular the Office for Civil Rights (OCR), has published substantial and detailed guidance in recent years and is enforcing that guidance as if it were law. However, none of the guidance has gone through the rule-making process. This has several implications: a shortage of valuable input from campus officials with expertise in this area; uncertainty how to implement the requirements contained in the guidance; and ongoing ambiguity about whether the guidance is actually required or optional.

We respectfully ask that you work with Department of Education Secretary Duncan to clarify that while sub-regulatory guidance can be helpful to institutions, it is to be considered advisory in nature. If the Department believes that additional, legally binding requirements are needed, it should pursue them through formal regulations developed through the notice and comment rule-making process, a process that ensures appropriate input from higher education institutions and other important stakeholders. This would go a long way in providing much-needed clarity to
universities about their compliance obligations related to this particular, significant issue and on other matters that arise in the future.

Sincerely,

Ray Cross
President
University of Wisconsin System